

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**THE STATE OF WASHINGTON,**

**No. 27046-7-III**

**Respondent,**

**Division Three**

**v.**

**DAVID MATTHEW WILSON,**

**UNPUBLISHED OPINION**

**Appellant.**

Schultheis, C.J. — David Matthew Wilson was convicted for the second degree assault of a prison guard. He appeals, claiming that the trial court improperly allowed the introduction of evidence that he had previously assaulted the guard. We find no abuse of discretion and affirm.

**FACTS**

Mr. Wilson was a resident of the Walla Walla County Jail on September 30, 2007. That afternoon he was escorted to the showers by a jail guard, Sergeant Tony Robertson.

At trial, Sergeant Robertson testified that when Mr. Wilson was finished with his

shower,

I opened the door, and [Mr.] Wilson was sort of half crouched down . . . he lunged out. He had something in his right hand, and I sort of pushed it away, and he backed off, and we were squared off, and he was lunging at me. So I was hollering at him to drop whatever he was holding.

Report of Proceedings (RP) at 15.

According to Sergeant Robertson, at some point Mr. Wilson said, ““This is for taking my food, bitch.”” RP at 20. Sergeant Robertson thought the comment referenced an infraction for which Mr. Wilson was punished by having his food restricted to “Nutriloaf,” a vegetable-based meal substitute. RP at 21.

Sergeant Robertson, who was wearing a protective vest of some kind, reported that the lunges were directed toward his neck. He stated that he kicked out to keep Mr. Wilson away from his body and called out for help. An officer in the control booth handed out a canister of pepper spray to subdue Mr. Wilson, at which point Mr. Wilson threw something in the air and said ““No more.”” RP at 16. Mr. Wilson then returned to his cell and Sergeant Robertson locked Mr. Wilson inside.

Sergeant Robertson returned to the area of the incident to look for the object that Mr. Wilson had been lunging with and had then thrown. Jail guard Timothy Montgomery answered the call for backup and helped Sergeant Robertson search the area. They found the arm to a pair of eyeglasses, which had been fashioned into a “shank.” RP at 18. One

end was sharpened and the other end was made into a handle with fabric covering.

Previously, a pair of eyeglasses with a missing arm had been found in Mr. Wilson's cell and was confiscated. The eyeglasses were admitted into evidence along with the shank.

Jail Officer Brian Miller, who was working in the control room, testified that he saw an altercation take place between Mr. Wilson and Sergeant Robertson. Officer Miller said that he heard Sergeant Robertson speaking in a loud voice and saw "arms and legs being, going back and forth and just a flurry of activity." RP at 33. He radioed for assistance and then handed the pepper spray to Sergeant Robertson.

Walla Walla County Sheriff Deputy Jeff Jackson investigated the assault. He testified that he received a copy of the security tape for the relevant time, but the machine evidently malfunctioned and the incident was not recorded.

Mr. Wilson had a different version of the events. He testified that Sergeant Robertson offered Mr. Wilson the chance to take a shower, and escorted him to the shower room. Mr. Wilson claimed that Sergeant Robertson handcuffed him after the shower. According to Mr. Wilson, Sergeant Robertson accused Mr. Wilson of making a threatening move, took him down, and hit him in the face. Mr. Wilson stated that he had previously made complaints about the guards for unwarranted punishment and threats of assault for being noisy. He denied ever using eyeglasses or lunging at the sergeant, and he disavowed any knowledge of the shank. Finally, he had asked to inspect the tapes of

the alleged incident, but the tapes were never provided.

During cross-examination, the State asked Mr. Wilson if he had punched Sergeant Robertson on an earlier occasion:

Q [BY THE STATE]. Have you had another incident with Sergeant Robertson beforehand?

A. Not that I am aware of.

Q. You don't remember punching him in the --  
[DEFENSE COUNSEL]: Judge, I'm going to object to this line of questioning.

THE COURT: If he can back it up. Keep going.

RP at 45.

The court excused the jury at the defendant's request. Mr. Wilson argued that evidence of a prior assault of the sergeant was not relevant and prejudicial. The State countered that the punching incident was "extremely relevant" because it showed Mr. Wilson did not like the sergeant. RP at 46.

The court initially denied the objection under ER 403:

I'm going to deny your objection. And I'm going to do it under Rule 403. I think it has some prejudice and probative value. [Its] probative value here is we've got two people with different versions, and it's difficult to understand what's going on here. The presence or absence of some bad blood, for want of a better term, bad feelings between parties, it seems to me is highly relevant. What in the world happened here? And there was some comment about some earlier relationship between the two of them. So on balance, I do not think that the unfair prejudice substantially outweighs [its] probative value. So I'm going to deny your objection. Overrule it.

RP at 46-47.

The State then elicited testimony that Mr. Wilson had previously given the sergeant a black eye:

- Q. . . . Mr. Wilson, there [h]as been some bad blood between you and Sergeant Robertson?  
A. Yeah, there is.  
Q. Has there been another incident that occurred last summer?  
A. I hit him after walking into my room, yeah, I did.  
Q. Hit him?  
A. Yeah.  
Q. Where did you hit him?  
A. In the face.  
Q. Did you give him a black eye?  
A. Yeah, I did.

RP at 47-48.

After the defense rested and the instructions conference occurred, the court clarified the earlier ruling and stated it was based upon ER 404(b):

I do want to clarify my last ruling, relative to what occurred between these parties. And I talked about Rule 403. My ruling, at least implicitly and I'm going to make it explicit, was also based on Rule 404 B, where prior bad acts don't come in. But one of the exceptions is motive. And that's what I was trying to get at. Something may have been going on here between these two. So I think in terms of motive, given the interaction that we had between them, and that there had been some, well, some problems between them, that it's admissible for the purposes of showing motive. I wanted to clarify that for the record.

RP at 53.

The jury convicted Mr. Wilson. He appeals.

## DISCUSSION

Mr. Wilson argues that the evidence of the prior assault was not relevant, unfairly prejudicial, and an improper use of evidence. ER 402, 403, 404(b). A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Davis*, 141 Wn.2d 798, 841, 10 P.3d 977 (2000).

Evidence of prior bad acts and misconduct is inadmissible to prove the defendant's character and to show his general propensity for misconduct. ER 404(b). Such evidence, however, "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." ER 404(b). The cited examples of the "other purposes" for which evidence of prior bad acts may be introduced is not exclusive. *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996).

Whether evidence is admissible under ER 404(b) is determined by a two-step analysis: (1) "the evidence must be shown to be logically relevant to a material issue before the jury" and (2) "if the evidence is relevant, its probative value must be shown to outweigh its potential for prejudice." *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Here, the trial court considered the parties' relevance arguments and properly ruled that the prior assault provided evidence of the relationship between the parties as a

context for the current alleged assault. It then correctly concluded that the probative value of the prior assault evidence outweighed any prejudicial effect.

As noted, the parties had different versions of what occurred. According to the State's evidence and argument, Mr. Wilson hated Sergeant Robertson and, angry about his dietary restriction punishment, seized the moment to assault the sergeant. The defense theory was that jail personnel hassled and threatened Mr. Wilson, and Sergeant Robertson falsely claimed that Mr. Wilson set upon the sergeant as a continuation of that course of conduct. The defense argued that, because he has no contact with other inmates or visitors and he was thoroughly searched prior to his shower, it was unreasonable to believe that he used a shank to lunge at Sergeant Robertson after the shower. Mr. Wilson testified that he was handcuffed, taken down to the ground, and assaulted, and he was using his bare hands to defend himself against the sergeant.

As the State argued, the prior assault evidence provided a motive of hostility for Mr. Wilson to assault Sergeant Robertson. But it also could have provided some benefit to Mr. Wilson. The prior assault evidence could support a motive of revenge for Sergeant Robertson to accuse Mr. Wilson of an assault.

Prior quarrels, threats, or arguments are admissible to show motive. *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). Evidence of these disputes between the defendant and the victim shows the relationship of the parties and their ill feelings

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toward one another. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997). The trial court did not abuse its discretion when it admitted the prior assault evidence.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, C.J.

WE CONCUR:

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Kulik, J.

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Korsmo, J.